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No. 91-1815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WESTBOROUGH MALL, INC., a Missouri Corporation,
GEORGE STAPLES, JR., and
WESTBOROUGH MALL ASSOCIATES,
a Missouri Limited Partnership,
Petitioners,

vs.

CITY OF CAPE GIRARDEAU, MISSOURI,
a Municipal Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court Rule 10 7

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RESPONDENT'S STATEMENT OF THE CASE

Petitioners' Statement Of The Case is accurate so far as it goes (with one exception hereafter noted), but it is so stingy with the facts and the contents of the various lower court decisions that an effort by Respondent to add the many omissions would be confusing to this Court. So, Respondent offers its own Statement Of The Case in as concise a manner as 13 years of litigation will allow, as follows:

In 1974 Petitioners filed for and obtained from the Cape Girardeau City Council the special shopping center C-4 zoning

for their proposed regional shopping mall development, as provided within Section 31 of the City's Zoning Code. Ordinance 904 granting that special zoning exempted Petitioners from the requirements of Section 31(e), which provided that if the shopping center was not constructed within three years, its special C-4 zoning would automatically revert to its previous zoning status. Petitioners eventually started preparation of their tract for the development, but in the five years which passed until early 1979, Petitioners still had no anchor tenants, no small tenants, no cash, debts exceeding $800,000, no commitments for temporary or permanent financing, and no architectural or building plans.

In March 1979, the development of nearby West Park Mall as a regional shopping center was publicly announced by the Drury and May Companies, who were well-financed, highly experienced, and had obtained commitments from two nationally-known anchor stores. On April 4, 1979, the City granted the developers of West Park Mall the necessary zoning to permit them to commence their development. The next day, April 5, 1979, Petitioners filed suit in state court against the individual City Council members, challenging the zoning of the competing West Park Mall site. In response to an inquiry from another City employee, the City Manager reviewed Petitioners' Westborough Mall C-4 zoning and concluded that it had reverted to a non-shopping center designation because *five* years had passed since the site had been zoned C-4 and no construction had begun. The City Manager overlooked the fact that Petitioners' C-4 zoning Ordinance 904 exempted the Westborough site from the operation of the three-year automatic reverter provision in Section 31(e). The local media reported the City Manager's opinion that Petitioners' C-4 zoning had reverted. The City Manager changed the master zoning map and reported his opinions to the City Council. The City Council took no action on the matter (contrary to Petitioners' statements found on lines 19-21 of page 5 of their Petition).

Upon filing their original suit, Petitioners notified the shopping center specialty news services of the action. May/Drury were undeterred in their development activity and completed their West Park Mall and opened it in 1981.

Petitioners admit that they knew immediately that the City Manager had make a mistake in overlooking the exemption. They took no steps whatsoever to notify the City Manager or the City Council or any other person that the mistake had been made. In response to the media's inquiries about the reverter opinion, Petitioners stated that they still had their zoning without mentioning the exemption as the reason. Petitioners told their investors that they still had their zoning and that the City Manager's reverter opinion was nothing to cause them any worry.

Petitioners' financing representative Charles Green had long been unable to pursue Petitioners' financing needs, because Petitioners had failed to provide him with anchor tenant leases, proposed lease forms, financial information, and necessary cash deposits. In July 1979, Green inquired of the City Manager concerning the Westborough zoning designation, to which the City Manager replied that in his opinion the Westborough site no longer carried C-4 zoning. The City Manager further stated that Green might want to have his own legal staff review the ordinance to satisfy himself of the validity of that opinion, but Green did not do so. Subsequently Green informed Petitioners that he was ceasing his efforts to obtain development loans for the project. Although Petitioners knew that the City Manager had made a mistake, they did not tell Green about the mistake or request him to proceed in financing efforts.

In August 1979, Petitioners filed an Amended Complaint in the state court action. They realleged their challenge to the competing West Park Mall zoning and asserted that the City Manager's statements that their own project no longer had C-4 zoning were "totally untrue", although they did not plead the

cause for that untruth and sought no remedy concerning the correct zoning of their own land. The City first learned of the City Manager's oversight in March 1980 when Petitioners filed their further Amended Complaint in the state court action and finally specifically pleaded the existence of their exemption from the automatic reverter provision. Thereafter, the City Council passed an ordinance reaffirming that the Westborough Mall tract was specifically exempted from the application of the automatic reverter provision and that the tract continued to be zoned C-4. Petitioners have claimed at all times that the Westborough tract continuously maintained its C-4 zoning.

Petitioners amended their original suit to include as Defendants the City itself, the City Manager individually, and the May-Drury developers of West Park Mall. After further amending those state court pleadings to allege violations of 42 U.S.C. Section 1983, the case was removed to Federal Court. An amended Complaint was thereafter filed by Appellants in seven counts: two under Section 1983, four under anti-trust and conspiracy theories, and one seeking declaration that the May/Drury/West Park Mall zonings were invalid. On Motions for Summary Judgment, District Court Judge Wangelin dismissed all seven counts (532 F.S. 284).

In 1983 in *Westborough I* (693 F. 2d 733)(Petitioners' Appendix A), the Eighth Circuit Court of Appeals sustained the dismissal of the count challenging the West Park Mall zonings, on the grounds that Petitioners had no standing to make such challenges against other persons' property. The Eighth Circuit further upheld the District Court dismissal of the individual City Council members and the City Manager from the suit, but ordered the District Court to give Petitioners a chance to prove their case under the Section 1983, anti-trust, and conspiracy theories. This Court denied certiorari (461 U.S. 945).

A 10-day jury trial was held later in 1983 seeking $24,505,567 damages, but before submission to the jury, Petitioners dis-

missed their three anti-trust claims. In two hours, the jury returned a verdict against Petitioners on their three remaining claims. However, in 1986 the Eighth Circuit in *Westborough II* (794 F. 2d 330)(Petitioners' Appendix *B)* ordered a retrial because of flawed jury instructions. This Court again denied certiorari (480 U.S 918).

By agreement of the parties, the retrial was held in 1988 without a jury before District Judge Gunn. Shortly before the trial, in which Petitioners claimed damages of only $7,210,438, Petitioners released Defendants May/Drury from the suit for only $10,000. Petitioners dismissed one of their remaining conspiracy counts before trial. The non-jury trial then commenced only against the City on one count of Section 1983 violation and one count of conspiracy with May/Drury to violate Section 1983. Petitioners offered no evidence on their conspiracy count, but did not dismiss it.

In April 1989, District Judge Gunn rendered his opinion (Respondent's Appendix A, no Petitioners' Appendix) (710 F.S. 1278), in which he dismissed all of Petitioners' claims upon the grounds that the City Manager's reverter opinions did not constitute the official policy of the City, relying heavily upon this Court's decision in *Praprotnik* (108 S. Ct. 915) and his own fact findings that the City Council neither authorized nor ratified the City Manager's actions. The District Judge held that the City had done nothing more than employ an individual who in the exercise of his discretion reached an erroneous discretionary decision. In view of the ruling against Petitioners on the basis of lack of proof of liability upon the City, the District Court did not address damages or other issues.

In *Westborough III* (910 F. 2d 1479)(Petitioners' Appendix C), the Eighth Circuit remanded the case to District Judge Gunn for his decision concerning damages. In February 1991, District Judge Gunn ruled (757 F.S. 1022)(Petitioners' Appendix D) that

Petitioners had failed to present any credible evidence of any loss in the value of their interests in their land or that any loss was attributable to the City Manager's reversion opinion. He found it unnecessary to address the effect of the $10,000 received by Petitioners in the pre-trial settlement from May/Drury.

The Eighth Circuit affirmed the dismissal in *Westborough IV* (953 F. 2d 345) (Petitioners' Appendix E), which Petitioners now seek to have reviewed by this Court.

ARGUMENT

This Court's Rule 10, "Considerations Governing Review on Writ of Certiorari," sets out the character of reasons that the Court will consider in exercising its judicial discretion to review on a writ of certiorari, as follows:

> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Petitioners' Petition for Writ of Certiorari does not cite Rule 10 or explain how their Petition satisfies Rule l0's "reasons that the Court will consider in exercising its judicial discretion." Petitioners neither describe any conflict between courts of appeals, nor any state court conflict with federal decisions, nor any important question of federal law which needs to be settled now.

Respondent will address each of the three "Questions Presented" by Petitioners as follows:

I.

Petitioners' Question 1 asks, "... whether a local government can be liable for a policymaker's unconstitutional conduct that is also illegal under local law?"

The Eighth Circuit's decision in *Westborough IV* (Petitioners' Appendix E), which this Petition seeks to have reviewed, does not address Question 1. Neither does the 1991 District Court decision (Petitioners' Appendix D) upon which *Westborough IV* ruled. Neither does *Westborough III* (Petitioners' Appendix C). The 1989 District Court decision (Respondent's Appendix A) found expressly that, under the law and the facts, the City Manager was *not* a policymaker in zoning matters and had *not* been delegated such authority, and therefore the City is not liable for his discretionary mistake under *Praprotnik;* however, Petitioners are not here seeking review of that District Court decision, especially since they did not even include it in their Petition Appendix as required by Rule 14(1)(k)(i).

Petitioners attempt to convince this Court that this case involves conflicting City policies. But the fact-finder, District Judge Gunn (a former Missouri Supreme Court Judge) in his 1989 decision (Respondent's Appendix A), found under state law that the City Council was the sole zoning policymaker and that the City Manager did not and could not establish zoning policy on his own. *Westborough IV* did not question those findings of fact and law.

Petitioners urge (Petition page 12) that "Practitioners in the field must find out whether governmental entities, as with individuals, can be liable where conduct implementing official policy violates law." They find themselves very interested in that matter, perhaps because a senior member of one of their firms of counsel, Robert E. Manley, was able and successful counsel in *Pembauer*, but it is not an issue in this case at this hour. It is hardly "one of the most important legal issues of the day." Petitioners

are merely seeking an advisory opinion on a matter that interests them but is not an issue in this case. As stated by this Court in *Flast v. Cohen,* 392 U.S. 83, 88 S. Ct. 1942 (1968),

> ". . . it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' . . .Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." (392 U.S. 96)

On page 11 of their brief, Petitioners raise a false issue when they complain that they were denied due process by the lack of a hearing before the City Manager rendered his reverter opinion. The issue is false, because Petitioners were exempt from the reverter, and no opinion or action by the City Manage could revert the zoning. Is a City Manager required to hold a hearing before he gives an opinion, erroneous or correct? Petitioners cannot complain about a lack of due process over a reverter that did not occur.

II.

Petitioners secondly ask this Court to review *Westborough IV* because the Eighth Circuit did not expressly decide the liability issue. They contend the Eighth Circuit erred in not reversing the District Court's 1989 decision against Petitioners on the liability issue (Respondent's Appendix A) and that they would therefore become entitled to nominal damages. Of course, it is obvious that Petitioners are hoping to salvage their attorney fees, not obtain the $1.00 nominal damages.

Respondent would have been pleased for the Eighth Circuit to have ruled on the liability issue, but the court chose not to do so. The District Court in 1989 expressly found on the facts that there was no liability on the City for the City Manager's mistaken opinion. No fact-finder has ever ruled in favor of Petitioners in these 13 years of litigation; District Judge Wangelin dismissed the case in 1981 on summary judgment, the jury ruled against Petitioners in 1983, District Judge Gunn ruled against them in 1989 and again in 1991, and the Eighth Circuit refused to grant Petitioners judgment NOV in both *Westborough I and II*. *Westborough II* ruled that "Reasonable persons could arrive at different conclusions in this case" (Petitioners' Appendix B, Petition page 43a).

District Judge Gunn's 1989 and 1991 decisions (Respondent's Appendix A and Petitioners' Appendix D) recite in detail all of the facts on both the liability and damage issues. We urge the Court to read those opinions to understand the facts beyond the condensations provided by the parties in these briefs. Petitioners' continual efforts to have the facts considered based on the Eighth Circuit's recitations in *Westborough I* and *II* are misplaced, because *Westborough I* recounted what Petitioners *hoped* to prove in a trial and *Westborough II* stated Petitioners' jury trial *theories*.

If this Court grants certiorari (which we then could identify as *Westborough V),* Petitioners would seek to have the case sent back to the Eighth Circuit for additional rulings on liability. In *Westborough VI,* the Eighth Circuit *could* then sustain the District Court finding of no liability and end the case, except for the expected fourth trip to this Court seeking certiorari. On the other hand, the Eighth Circuit *could* reverse the District Court and find the liability facts to the opposite result, and *then* reestablish its *Westborough IV* findings of no actual damages and award $1.00 nominal damages, and *then* consider the effect of the $10,000 pre-trial settlement on nominal damages, and *then* order hearings on attorney fees, and *then* await another certiorari petition by one party or the other.

Still yet, this Supreme Court of the land *could* choose to interrupt its busy appellate schedule and review all the 12 volumes of trial transcript and boxes of exhibits and become the ultimate jury.

None of these alternatives appears to fit a reasonable concept of justice. Frankly, District Judge Wangelin had the case properly analyzed when he dismissed it back in 1981 on summary judgment.

Why did the Eighth Circuit rule as it did in *Westborough IV*? Perhaps it overlooked the thought of nominal damages (which would be understandable, because Petitioners have continually sought millions in compensatory damages and never suggested to the jury or the District Court Judges or the Eighth Circuit that nominal damages were an alternative). Perhaps it figured that there could be no nominal damages where Petitioners had already received a $10,000 compensatory damage settlement. Perhaps it had no thought of overruling District Judge Gunn's 1989 decision of no liability, which is foretold by its ruling that Petitioners' other complaints about the District Court's rulings are "without merit" (See *Westborough IV,* Petitioners Appendix

E on page 59a lines 17 and 18). Perhaps they thought that 13 years, two full-blown District Court trials, four Court of Appeals hearings and opinions, and two petitions for certiorari were enough and ruled impatiently in exasperation. One cannot speculate accurately.

Concerning liability, District Judge Gunn relied heavily upon *Praprotnik*, as noted by the Eighth Circuit in *Westborough III*. The Eighth Circuit was heavily involved in *Praprotnik* from start to finish and well knows its rules. If the Eighth Circuit thought District Judge Gunn was incorrect in his *Praprotnik* evaluation of this case, it could easily have so ruled. But the panel chose not to change his ruling. No judge on the panel (not even the one dissenter) asked that the case be reheard or considered en banc, and no member of the full court asked for an en banc ruling. It is obvious that the Eighth Circuit is satisfied with District Judge Gunn's *Praprotnik* decision of no City liability. An ordering of a *Westborough V* hearing by this Court will surely produce such a finding in *Westborough VI* after great expense of time and money.

This Court will observe that Petitioners never *lost* their C-4 zoning, because they were exempt from its reverter by Ordinance 904. It is true that for a period of months there stood an erroneous *opinion* of reverter rendered by the City Manager, perhaps rendered negligently. One could say that the City Manager "slandered" Petitioners' zoning. But governments are not liable for the negligence of their employees, under *Parratt v. Taylor*, 451 U.S. 527 (1981) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). And Petitioners deliberately chose not to mitigate the offense by concealing their knowledge of the error and refusing to correct that error by advising the City of the mistake or telling their financier or prospective purchasers. Petitioners produced absolutely no witness to testify that he acted adversely to Petitioners because of the erroneous opinion. *As* District Judge Gunn found from the facts, Petitioners' own

development ineptitude had destroyed their project's value long before the City Manager made his mistake.

Concerning Petitioners' efforts to salvage some attorney fees, any court deciding that matter would have to consider that (1) Petitioners lost all of their original case in *Westborough I*, except for getting a chance to prove their reverter theory for things which arose *after* the original suit was filed, (2) Petitioners dismissed half of their theories before submitting the case to the jury in 1983, (3) Petitioners lost the rest of their 1983 jury trial, (4) Petitioners lost their 1988 trial before District Judge Gunn, (5) Petitioners have never, until now, asked for nominal damages and lost all their claims for compensatory damages, and (6) Petitioners made no attempt to mitigate their damage by immediately notifying the City of the City Manager'8 mistake and obtaining quick correction of the problem, but rather "sandbagged" the City (that's what we call it here in Missouri) when they had utterly failed in their own development efforts and were hoping the City or May/Drury would eventually pay them off to eliminate the litigation. Were Petitioners really the "prevailing party"? How much attorney fees would they be awarded against the City for obtaining a court ruling that their constitutional rights had been violated by the City Manager's mistake (which was admitted at trial by the City) which caused them no actual damage?

Respondents have searched for legal authority relative to a party's entitlement to nominal damages and attorney fees after having received compensatory damages. No appellate authority has been located, but *Webb v. Distefano*, 575 F. Supp. 639 (D.C. Neb. 1983) addressed the situation. There, a prisoner sued and recovered compensatory damages for injuries caused by a police officer, and then sued a second officer for those same injuries. The second officer sought summary judgment, to which the prisoner objected because he claimed he was entitled to at least nominal damages. The Nebraska District Court ruled that the

prisoner was collaterally estopped from such a claim because the damages had already been determined. That decision was apparently not appealed. Here, Petitioners desire a nominal damage award when they had already received a $10,000 compensatory damage settlement, obviously for the purpose of seeking attorney fees. It would not be justice for the City to have to pay any attorney fees for Petitioners under such circumstances.

It would be a total waste of judicial resources to hear this case further.

III.

Thirdly, Petitioners ask this Court to review *Westborough IV* because the opinion did not match the theory Petitioners used to claim their damage. At the 1988 trial before District Judge Gunn, Petitioners tried to prove their property had a large "before the reverter" value and a small "after the reverter value" in trying to receive the $7 million difference (contrasting their 1983 jury trial effort to obtain $24 million damages by seeking alleged lost profits from the mall they did not build). In his 1991 ruling on damages, District Judge Gunn found that Petitioners failed to prove their case when both of their "experts" erroneously calculated their "before and after" values. He next found that the facts did not support Petitioners' claims that the alleged drop in value was caused by the erroneous reverter opinion, but rather on Petitioners' own business failings.

In *Westborough IV*, The Eighth Circuit focused on Judge Gunn's second reason rather than the first. The Eighth Circuit ruled,

> "Thus, we cannot say the District Court committed clear error in finding Westborough suffered no damages as a result of the City Manager's actions. Accordingly, we did not consider Westborough's arguments relating to the calculation of damages." (Petitioners' Appendix E, page 59a, lines 10-14).

The *Westborough IV* ruling did not contradict Judge Gunn. Petitioners' argument is based upon an erroneous analysis of those rulings.

CONCLUSION

For the reasons stated, the Petition for Writ for Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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APPENDIX

RESPONDENT'S APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 80-0105 C

WESTBOROUGH MALL, INC., et al.,
Plaintiffs,

vs.

CITY OF CAPE GIRARDEAU, MISSOURI,
Defendant.

MEMORANDUM OPINION

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri limited partnership, bring this civil rights action pursuant to 42 U.S.C. §1983 against the City of Cape Girardeau (City) alleging a deprivation of their procedural due process rights under the fourteenth amendment and a conspiracy between the City and certain private parties.[1]

This case has had a long history. In *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983) (*Westborough I*) the Eighth Circuit Court of Appeals reversed and remanded for trial a summary judgment entered on behalf of defendants. On remand plaintiffs voluntarily dismissed three counts of their original complaint and the jury returned a verdict in favor of defendants on the three

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[1] On March 30, 1988 the parties stipulated, pursuant to Fed.R.Civ.P. 41(a)(i), to the voluntary dismissal with prejudice of the following defendants: Charles L. Drury, Drury Industries, Inc., The May Department Stores Co., May Center, Inc. (f/k/a May Stores Shopping Centers, Inc.), West Park Associates and May Centers of Cape, Inc.

remaining counts. Thereafter, the Eighth Circuit reversed the jury verdict for defendants holding that the jury instructions were prejudicially erroneous. *Westborough Mall, Inc. v. City of Cape Girardeau,* 794 F.2d 930 (8th Cir. 1986), *reh'g denied,* 804 F.2d 108 (1986), *cert. denied,* 107 S.Ct. 1373 (1987) (*Westborough II*).

In this, the most recent phase of the litigation, plaintiffs' remaining claims under 42 U.S.C. §1983 were tried by consent of the parties to the Court sitting without a jury. Plaintiffs assert that the City acting by and through the city manager and city council deliberately abused its authority by improperly applying an automatic reverter provision of the City zoning code to plaintiffs' land. Defendant contends that the alleged reversion of plaintiffs' zoning was the result of a negligent oversight by the city manager which the city council neither authorized nor ratified. The Court, having considered the pleadings, the evidence and testimony adduced at trial, the briefs of the parties and the applicable law, now enters judgment in favor of defendant and makes the following findings of fact and conclusions of law in accordance with Rule 52, Fed.R.Civ.Pro.

Findings of Fact

With the additions noted below, the Court finds that the facts are as stated in the published opinion of the Eighth Circuit in *Westborough II*. *See Westborough Mall, Inc. v. City of Cape Girardeau,* 794 F.2d 330, 333-35 (8th Cir. 1986), *reh'g denied,* 804 F.2d 108 (1986), *cert. denied,* 107 S.Ct. 1373 (1987).

In 1973 plaintiff Westborough Mall, Inc. began work on a regional shopping facility to be known as Westborough Mall by obtaining an option to lease approximately 67.5 acres of land in Cape Girardeau, Missouri. Concurrently, Charles L. Drury expressed interest in developing a shopping center in Cape Girardeau to be called West Park Mall. The proposed site for West Park Mall was less than one mile from the Westborough site.

On June 5, 1974 the Cape Girardeau City Council enacted Ordinance No. 904 which assigned a regional shopping center zoning classification of C-4 to the Westborough Mall property. Ordinance No. 904 also exempted the property from the provisions of another city ordinance, Ch. 30 §31(e). Ch. 30 §31(e), referred to as the automatic reverter provision, provides for the automatic reversion of a C-4 zoning designation to its prior status if a shopping center is not constructed on the site within three years. The C-4 zoning designation, which is specifically designed for shopping centers, requires the developer to formulate comprehensive, coordinated building plans and layouts.

In September of 1976 plaintiff George Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. Westborough Mall, Inc. then executed a subordinated ground lease on the site and subleased the property to Westborough Mall Associates.

In June of 1977 the City by ordinance corrected certain legal descriptions of the Westborough site and confirmed that the property was zoned C-4. The City also issued a building permit to Westborough Mall Associates. This permit required construction to begin within six months and be completed within two years. Thereafter, the partnership expended approximately $800,000 to conduct a survey, grade the site, and install an underground drainage system, entrances, a swale and a berm.

On March 18, 1979 the development of West Park Mall as a regional shopping center was publically announced. The Drury and May companies, the developers of the West Park Mall, were well-financed, highly experienced, and had obtained commitments from two nationally known anchor stores. By contrast, after five years of effort, the Westborough Mall developers had no anchor tenants, cash, commitments for temporary or permanent financing, or architectural and building plans.

On April 4, 1979 the City granted the developers of West Park Mall a zone change to C-2, and permitted them to begin construction of their project in a C-2 zone with the understanding that they would later apply for a C-4 designation. Although the C-2 zoning designation is more restrictive than the C-4 designation with respect to building size and location, it does not require developers to obtain either a building plan approval or a plot layout.

On April 5, 1979 Staples filed suit in state court challenging the rezoning of the West Park Mall site. A few days after the suit was filed in April 1979, the city manager, W. G. Lawley, received an inquiry from another city employee concerning the status of plaintiffs' building permit. In response to that inquiry, Lawley reviewed the City's zoning ordinances and erroneously concluded that the Westborough Mall C-4 zoning had reverted to a non-shopping center designation because five years had passed since the site had been zoned C-4 and no construction had begun. The city manager overlooked the fact that Ordinance No. 904 expressly exempted the site from the operation of the automatic reverter provision, Ch. 30 §31(e).

On April 6, 1979 the local media reported the city manager's opinion that plaintiffs' C-4 zoning had reverted. Thereafter, the city manager conferred with the city attorney and on April 11, 1979 prepared a memorandum to the city engineer ordering him to change the City's master zoning map to show a reversion of the Westborough site from C-4 to the original zoning. The master zoning map was changed as ordered by the city manager. In addition, the city manager directed the city engineer not to issue or renew building permits for the construction of plaintiffs' mall. No requests for building permits were received.

In accordance with his mistaken opinion, the city manager notified the city council in a memorandum that "until instructed otherwise by the City Council or a Court of proper jurisdiction"

he intended to apply the automatic reverter provision of the city zoning code to the Westborough Mall property. This memorandum was given to each city council member and discussed at the city council's April 17, 1979 meeting. The city council took no action on the matter.

On May 3, 1979 Carl Penzel, plaintiffs' grading contractor and a limited partner in Westborough Mall Associates, filed a $312,000 mechanic's lien against the Westborough tract. On May 23, 1979 Penzel filed suit on his mechanic's lien and to collect a $5,000 penalty owed him under his construction contract with plaintiffs due to their failure to begin construction by May 1, 1979.

In July 1979 Charles Green, the plaintiffs' financing representative, inquired of the city manager concerning the zoning designation of the Westborough tract. The city manager replied that in his opinion the Westborough site no longer carried a C-4 zoning. He further stated that Green might want to have his legal staff review the ordinance to satisfy himself of the validity of the city manager's opinion. The city manager provided Green with a copy of the city's zoning code.

Green subsequently informed plaintiffs of his decision to cease his efforts to obtain development loans for their project. The city manager's opinion concerning the status of plaintiffs' zoning did not materially influence Green's decision. He had long been unable to proceed with plaintiffs' construction financing because of their failure to provide him with anchor tenant leases, proposed lease forms, financial information and a cash deposit.

On August 1, 1979 the West Park Mall developers obtained a rezoning of their property from C-2 to C-4. The development of the project proceeded thereafter and the West Park Mall opened in 1981.

In August 1979 plaintiffs filed their first amended complaint in the state court action. Although plaintiffs realleged their challenge to the zoning of the West Park Mall site and asserted that statements to the effect that plaintiffs no longer had C-4 zoning were "totally untrue," they sought no remedy concerning the zoning of their own land.

The City learned of the city manager's oversight in March 1980 when plaintiffs filed their second amended complaint in the state court action and pled the existence of their exemption from the automatic reverter provision.

In September 1980 the city council passed Ordinance No. 1599 reaffirming that the Westborough Mall tract was specifically exempted from the application of the automatic reverter provision and that the tract was zoned C-4.

Conclusions of Law

The Court has jurisdiction over this action pursuant to 28 U.S.C. §1331. The law of this case as stated in *Westborough I* and *Westborough II* is subject to the findings of fact by this Court on the evidence presented on this retrial.

The central and dispositive issues before the Court is to determine whether the actions of which plaintiffs complain amount to official municipal policy so as to subject the City to liability under §1983. The City cannot be held liable under §1983 unless plaintiffs demonstrate a "direct causal link" between a municipal policy or custom and the alleged procedural due process violation. *City of Canton v. Harris*, 57 U.S.L.W. 4270, 4274 (February 28, 1989); *see City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 926 (1988). Respondeat superior liability does not attach under §1983, but municipal officials who have "final policymaking authority" may by their actions subject municipalities to §1983 liability. *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). Whether an official possesses "final policymaking

authority" is a question of state law. *Id.* Policymaking authority may be "granted directly by legislative enactment" or "delegated by an official who possesses such authority." *Id.*

Plaintiffs contend that the city manager possessed "final policymaking authority" or that the city council, by failing to act, ratified the city manager's actions pursuant to the automatic reverter provision and adopted the reverter of plaintiffs' zoning as the official policy of the City. Defendant asserts that the city council neither authorized nor ratified the city manager's actions.

The Court concludes that the actions taken by the city manager with regard to plaintiffs' zoning do not constitute the official policy of the City. The city council possesses final policymaking authority with respect to zoning by virtue of its authority under state law to enact ordinances adopting and approving zoning designations. Mo.Ann.State. §89.020 (Vernon 1989); *McCarthy v. City of Kansas City,* 671 S.W.2d 790 (Mo.Ct.App. 1984). (Zoning is a legislative function exercised exclusively through the enactment of ordinances.) The city council enacted Ordinance No. 904 establishing plaintiffs' C-4 zoning exempt from the automatic reverter provision and Ordinance No. 1599 reaffirming that plaintiffs' site was zoned C-4, but there is no "direct causal link" between the passage of these ordinances and plaintiffs' alleged injury. *City of St. Louis v. Praprotnik,* 108 S.Ct. at 926.

The Court further concludes that the city council did not authorize or ratify the city manager's decision with respect to the reversion so as to make it the official policy of the City. Although the city manager apprised the city council of his intention to apply the reverter provision to plaintiffs' site, the city council never formally approved that decision or the basis for it. *See City of St. Louis v. Praprotnik,* 108 S.Ct. at 926 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification [is] chargeable to the municipality.")

In addition, the Court concludes that the city council did not delegate its official policymaking authority to the city manager. Acquiescence in the discretionary decisions of subordinates is not delegation to them of the authority to make policy. *City of St. Louis v. Praprotnik,* 108 S.Ct. at 927. Similarly, the failure to investigate the basis of a subordinate's decision is not equivalent to the delegation of policymaking authority. *Id.* Moreover, a decision taken by a subordinate does not become chargeable to the municipality as policy unless the authorized policymaker approves that decision and the basis for it. *Id.* at 926; *see also id.* at 927 (suggesting that "express approval" may be necessary).

Although the unauthorized acts of the city manager had the "potential to become official policies" or may have been "perceived" as such, §1983 liability does not attach to injuries inflicted solely by employees or agents. *See City of St. Louis v. Praprotnik,* 108 S.Ct. at 925 n.2. The City has done no more than employ an individual who in the exercise of his discretion reached an erroneous decision. *Id.* at 925; *see also Landrigan v. City of Warwick,* 628 F.2d 736, 747 n.7 (1st Cir. 1980).

Plaintiffs also allege that the City conspired with the developers of the West Park Mall to cause the reversion of plaintiffs' C-4 designation and to deprive them of their rights to procedural due process. Plaintiffs have offered no credible evidence of the existence of a conspiracy between the City and those developers.

Having found against plaintiffs on the critical issue concerning the city manager's action regarding reverter, the Court need not address other issues raised.

Judgment for defendant.

Dated this 20th day of April, 1989.

/s/ George Gunn
United States District Judge